NO. 94732-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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MARGARET RUBLEE, Individually and as
Personal Representative of the Estate of VERNON D. RUBLEE,

Plaintiff-Petitioner,

v.

PFIZER, INC.,

Defendant-Respondent.

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# PRODUCT LIABILITY ADVISORY COUNCIL, INC. *AMICUS CURIAE* BRIEF ON THE MERITS

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## I. INTEREST OF AMICUS

The Product Liability Advisory Council ("PLAC") is a non-profit association of 88 major companies representing a broad cross-section of American and international product manufacturers. See https://plac.com/PLAC/AboutPLACAmicus. Although Defendant-Appellee Pfizer Inc. ("Defendant") is a corporate member of PLAC, no person other than Amicus paid for this brief's preparation or submission.

PLAC seeks to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on enhancing and reforming the law affecting complex litigation and products liability. Its activities include the submission of amicus curiae briefs in cases involving significant issues affecting the law of products liability. Since 1983 PLAC has filed over 1,100 briefs as amicus curiae in state and federal courts.

PLAC is interested in this case because the dispute involves the interpretation of provisions of the Second and Third Restatements of Torts. PLAC supports the American Law Institute's laudable objective of the Restatements, to aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.

For this brief, PLAC has enlisted the assistance of Professor James Henderson – a professor emeritus at Cornell Law School who has taught,

written and lectured on the subject of tort law and, in particular, products liability, for over half a century. He has coauthored leading case books on the subject, and the American Law Institute chose him as one of two Reporters to write the Restatement, Third, of Torts: Products Liability. Professor Henderson thus has particular knowledge and experience about the subject at hand. His curriculum vitae is attached hereto as Exhibit A.

## III. INTRODUCTION

The apparent-manufacturer doctrine predates modern strict products liability by many years. It was an important corollary to Judge Cardozo's signature decision in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), which held that negligence claims could be brought directly against product manufacturers. Prior to the adoption of § 402A of the Restatement, Second, of Torts (1965), the Doctrine enabled plaintiffs to recover from sellers who held themselves out as manufacturers. Modern products liability law, embodied in § 402A, enables plaintiffs to pursue strict liability claims against all participants in the stream of distribution.

The Doctrine was never intended to impose liability on defendants who were not in the chain of distribution. In this case, Plaintiff has advocated for a sui generis application of the Doctrine that is inconsistent with its history and purpose. This brief will first explain the origins of the

Doctrine and its requirements. It will then demonstrate how those requirements were correctly applied by the Court of Appeals.

## IV. DISCUSSION

### A. History of the Apparent-Manufacturer Doctrine.

The history of the apparent-manufacturer doctrine is set forth in *Stein v. Pfizer Inc.*, 228 Md. App. 72, 85-98, 137 A.3d 279, 286-294 (2016). The Doctrine applied only to those "in the chain of distribution of the product in question," and was premised upon a buyer's "reliance upon the care taken by the seller as if it were his own." *Id.*, at 86, 137 A.3d at 287. The Doctrine was necessitated by the more onerous legal standard imposed on plaintiffs for proof of negligence by a non-manufacturing seller compared with that of the actual manufacturer.

> The general rule, then, was that, in the 'absence of misrepresentation or of negligence in the selection of goods, an intermediate distributor [was] liable to a customer only for defects discoverable upon reasonable inspection . . . .' In other words, while an actual manufacturer of a chattel had a duty to warn potential users of any danger that might arise from its intended use, *Restatement of Torts,* §§ 388, 394, a non-manufacturing seller or distributor of that chattel generally did not. And, although an actual manufacturer had a duty 'to exercise reasonable care in the manufacture of a chattel which, unless carefully made,' presented 'an unreasonable risk of causing substantial bodily harm' to its user, *Restatement of Torts,* § 395, a non-manufacturing seller or distributor of that chattel generally had no such duty.

*Id.*, at 87-88, 137 A.3d at 288.

*Swift & Co. v. Blackwell*, 84 F.2d 130, 132 (4th Cir. 1936), illustrates a classic application of the Doctrine. The plaintiff ingested broken glass by drinking milk from sealed cans of evaporated milk purchased from a store that, in turn, had purchased the product from Swift. The court of appeals recited the product's packaging as follows:

> 'Swift's Sterilized Evaporated Milk, Quality of Swift's Premium, Accepted American Medical Association,' the word 'Swift's' being printed in bold type. Scattered over the face of each of these spaces was the word 'Swift' repeated eight times. . . . On the other side panel occurred the word 'Guaranty' and below it in small type the words 'Swift's Evaporated Milk Is Pure Cow's Milk Reduced by Evaporation,' and directions for the addition of water.

*Id.*

Swift argued that it was not liable because it was not the actual manufacturer and there was no privity between the plaintiff and Swift. Relying on § 400 of the Restatement, First, of Torts, the court of appeals rejected Swift's argument because Swift had held itself out as the manufacturer by labeling the evaporated milk as a Swift product and was therefore subject to liability under negligence law for the condition of the product it had sold to the retailer.[1] Salutary as it was in such cases before

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[1] See also, *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 A. 385, 391 (1932), *overruled in part on other grounds by Porpora v. City of New Haven*, 122 Conn. 80, 187 A. 668 (1936) ("the ordinary, reasonable person reading this label would have inferred that Armour & Co. was the packer of the product.")

§ 402 A, the Doctrine is rarely invoked anymore because all suppliers in the chain of distribution are routinely subject to strict liability.[2]

### B. The Apparent-Manufacturer Doctrine Is Premised Upon Misrepresentation of the Identity of the Manufacturer.

The apparent-manufacturer doctrine provides a representation-based, quasi-contractual ground for holding sellers, distributors, and other similarly-situated non-manufacturers liable as though they were manufacturers when they hold themselves out to the purchasing public as such. As previously indicated, the Doctrine came into our law in an earlier period when courts still required plaintiffs to meet a more rigorous standard to impose liability on non-manufacturers in the chain of distribution.[3] In the seminal *MacPherson* decision, Judge Cardozo drew a sharp distinction between the duties of manufacturers and others in the chain of distribution:

> [Buick] was not merely a dealer in automobiles. It was a manufacturer of automobiles. It was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests.

*MacPherson*, 217 at 394, 111 N.E. at 1051.

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[2] See *Restatement, Second, of Torts*, § 402A (1965), cmt. *f* ("[Strict liability] therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor. . . ."). See also, *Hebel v. Sherman Equip.*, 92 Ill. 2d 368, 374, 442 N.E.2d 199, 202 (1982) (questioning whether anything remains of the Doctrine in light of the advent of strict liability).

[3] See *Restatement, Third, of Torts: Products Liability* §14, Comment *d* (1998).

In the modern era, when all members in the distributive chain are exposed to the same strict liability, the apparent-manufacturer doctrine is typically superfluous. But the Doctrine still serves a purpose, even if more limited than before. The Third Restatement retains the Doctrine for application in jurisdictions that "by statute treat nonmanufacturers more leniently than manufacturers" and do not also enumerate statute-specified responsibilities for sellers that hold themselves out as manufacturers. In the absence of such a statute, the common-law rule governs.[4]

For much of its history, the apparent-manufacturer doctrine was limited to "a retailer or distributor [that] has held itself out to the public as the manufacturer of the product."[5] As will be developed more fully in Part C, below, the apparent-manufacturer doctrine generally is available to plaintiffs only if they satisfy prerequisites associated with a sales-distribution transaction. Thus, if the defendant is not a seller in a business transaction; or if the seller does not hold itself out as a manufacturer to the purchasing public; or if the purchaser in the same transaction does not rely

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[4] *Restatement, Third, of Torts: Products Liability* § 14, Comment *b.* This is not the case in Washington. While Washington's Products Liability Act eliminated strict liability for most sellers, it imposes specific obligations on seller and similarly-situated parties that hold themselves out as manufacturers. *See* RCW 7.72.040(2)(e); RCW 7.72.010(2). Thus, the common-law doctrine is inapplicable.

[5] *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1236 (9th Cir. 1989) (Arizona law) (emphasis added). See also *Restatement, Third, of Torts: Products Liability* § 14 (1998) (Doctrine applies to a defendant "who sells or distributes as its own a product manufactured by another")

to its detriment on the seller's misrepresentation; courts will not treat the non-manufacturer defendant as a manufacturer. To appreciate that the apparent-manufacturer doctrine has one foot in transactional contract law, one need only consider the cases cited by Plaintiff in this case that speak of the defendant who misrepresents itself as manufacturer being "estopped" from subsequently denying that fact at trial.[6]

The apparent-manufacturer doctrine is first cousin to promissory estoppel.[7] This helps to explain why the Doctrine imposes more formal prerequisites than does the consumer-expectations test for product defect, which is purely a creature of tort.

### C. The Apparent-Manufacturer Doctrine: Elements and Policy Justifications

The formal prerequisites for application of the apparent-manufacturer doctrine reflect the fact that its doctrinal basis finds its source in representations contained in the original contract of sale between a product seller and its purchaser.

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[6] See Plaintiff's Main Brief, at pp. 8-9.

[7] Under Washington law, promissory estoppel requires satisfaction of five elements, among which are justified reliance upon a promise and a resulting change in position by the promisee. See *Wash. Educ. Ass'n v. Wash. Dep't of Ret. Sys.*, 181 Wash.2d 212, 332 P.3d 428, 435 (2014).

1. *The Apparent Manufacturer Doctrine is Limited to Sellers or Other Commercial Distributors in a Sales/Distribution Transaction*

For much of its history, the apparent-manufacturer doctrine "applie[d] only where a retailer or distributor has held itself out to the public as the manufacturer of the product." *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1236 (9th Cir. 1989) (citing cases).[8]

The requirement that defendant be a commercial seller or distributor is ubiquitous in American products liability law. Thus, the general liability rule under § 402A requires products-liability defendants to be commercial sellers/distributors of the product.[9] Such tort liability in general requires the sale or other commercial distribution by defendant, whether the claim is based on the consumer expectations standard or the risk utility standard. More particularly, § 400 of the Restatement, Second, upon which Plaintiff

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[8] See *also Restatement, Third, of Torts: Products Liability* § 14 (1998) (doctrine applies only to a defendant "who ***sells or distributes*** as its own a product manufactured by another") (emphasis added). *See Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997) ("[T]he overwhelming majority of the opinions reject[] application of apparent manufacturer liability to a trademark owner not in the chain of distribution."); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1463 (2d Cir. 1995) ("[N]o New York court has ever extended liability under the doctrine to anyone other than sellers of products manufactured by third parties.").

[9] See *Restatement, Second, of Torts* § 402A(1) (1965) ("One who sells any product in a defective condition... .") See also *Restatement, Third, of Torts: Products Liability* § 1 (1998).

relies in this case, also imposes this requirement, as does § 14 of the Restatement, Third, which codifies and clarifies § 400.[10]

Considerations of both fairness and efficiency dictate that to be enforceable (bringing the potential for crushing liability) the holding-out/misrepresentation must be made by a seller in the context of a sales transaction with the buyer.[11]

2. *The Seller Must Hold Itself Out – Represent Itself –As the Manufacturer of the Product In Question.*

Apparent-manufacturer responsibility rests on representations in a sales transaction rather than being imposed automatically on all product distributors by law.[12] To be liable as an apparent manufacturer, the seller of a harm-causing product must hold itself out to the purchaser as the product's manufacturer in the relevant sales transaction. Both § 400 of the Restatement, Second, and § 14 of the Restatement, Third, of Torts impose this requirement. Although § 400 does not employ the term "represents," the notion of "Selling as [One's] Own Product [a] Chattel Made by Another"[13] clearly is the functional equivalent. And § 14 of the Restatement,

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[10] See *Restatement, Second, of Torts* § 400 (1965) and *Restatement, Third, of Torts: Products Liability* § 14 (1998).

[11] For a treatment of these principles in connection with American tort law generally see James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 Ind. L.J. 467 (1976).

[12] See *Restatement, Second, of Torts* § 400 (1965), Illustrations 1 and 2.

[13] See *Restatement, Second, of Torts* § 400 (1965).

Third, uses the phrase "***representing*** oneself as the manufacturer."[14] "Holding out" and "representing" both strongly suggest a level of specificity of expression greater than merely acting so as to create a general impression.

Both of the Illustrations in § 400 of the Restatement, Second, emphasize that the relevant representations of the seller's status as manufacturer must be made to the purchaser of the product.[15] Moreover, as the Illustrations make clear, non-purchasing bystanders are entitled to benefit from the Doctrine if, but only if, the purchaser has relied on the seller's representations.[16]

By contrast, when purchasers in underlying sales transactions know that the defendant is not the manufacturer, no representation within any relevant business transaction has been made to begin with. In that event there is nothing for bystander victims to benefit from, derivatively, by way of holding the non-manufacturer-defendant liable as a manufacturer. Under these last-described circumstances, the bystanders might have a claim against the seller and the manufacturer under § 402A.[17] But the employees

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[14] See *Restatement, Third, of Torts: Products Liability* § 14, Comment *c* (1998) (emphasis added).

[15] See *Restatement, Second of Torts* § 400 (1965), Illustrations 1 and 2.

[16] In both of the Illustrations, the injured victim-plaintiffs are bystanders injured through the reliance of product purchasers.

[17] Quigley, as a manufacturer/seller could have been liable under § 402A of the *Restatement, Second.* See *supra* note 2 and text accompanying.

as non-purchaser-bystanders cannot satisfy the threshold requirements for a derivative claim against an apparent manufacturer.

The policy reasons supporting this distinction are straightforward enough. Limiting a non-manufacturer-seller's responsibility under the Doctrine to the terms of the contract of sale imposes reasonable limits on what might otherwise be wide-open, potentially crushing, socially wasteful exposure to liability. When the seller chooses not to hold itself out as the manufacturer, presumably its (and its customers') insurance costs are reduced and the immediate purchasers are incentivized to insure themselves. Leaving decisions regarding cost allocation to the parties immediately affected is not only efficient but also fair. In any event, in most cases victims injured by defective products will be able to recover against all commercial sellers, including actual manufacturers. [18] Marginal increases in the opportunities for plaintiffs to recover by applying a vague consumer-protection approach to apparent manufacturers generates social costs that are unnecessary, unpredictable, and unjustifiably high.

3. *The Initial Purchaser of the Product Must Reasonably Believe that the Defendant Was the Manufacturer*

Reliance is a necessary element of the apparent manufacturer doctrine. Section 400 is somewhat confusing regarding who must rely on

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[18] See *supra* note 2 and text accompanying.

the misrepresentation regarding the manufacturer of the defective product. On the one hand, § 400 says, "The actor puts out a chattel as its own product in two types of cases. The first [and only type at issue in the instant case] is where the actor appears to be the manufacturer of the chattel... ."[19] Here, the question is "***To whom*** must the defendant actor appear to be the manufacturer?" Common sense and the analysis thus far suggest that, in the first instance, it must be the purchaser of the harm-causing product. On the other hand, § 400 observes that "[t]he casual reader of a label is likely to rely upon the featured name, trade name, or trademark, and overlook the qualification of the description of source."[20] But the context of that observation is in connection with an example of apparent manufacturer materially different from the present case, in which the actual manufacturer explicitly asserts that the alleged apparent manufacturer made the product specially for him.

Illustration 1 to § 400 clarifies that the focus is on purchaser's reliance. There, C purchased a floor stain that was packaged and sold under A's brand name. When C lights a match, the floor stain injuring his wife and friend. The wife and friend can sue A under the apparent-manufacturer

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[19] See *Restatement, Second, of Torts* § 400, Comment *d* (1965).

[20] *Ibid.*

doctrine but only because C bought the product thinking that A was the manufacturer.[21]

4. *A Minority Approach: Applying the Apparent-Manufacturer Doctrine to Trademark Licensor*

The vast majority of courts that have addressed the issues have limited the apparent-manufacturer doctrine to product sellers and others in the chain of distribution. Recognizing this fact, the Tenth Circuit dismissed an apparent-manufacturer claim against a trademark licensee, explaining that the "overwhelming majority of the opinions reject[ the] application of apparent manufacturer liability to a trademark owner not in the chain of distribution."[22]

Nevertheless, some courts have applied the Doctrine to trademark licensors whose product is sold under the company's trade name where the trademark licensor participated in the design or manufacturing process. The Third Restatement made explicit—and thereby sought to clarify—this

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[21] Illustration 1 states as follows:

> A puts out under his own name a floor stain which is manufactured under a secret formula by B, to whom A entrusts the selection of the formula. The stain made under this formula is inflammable, as a competent maker of such articles would have known. Of this both A and B are ignorant, and neither the advertisements nor the directions contain any warning against using it near unguarded lights. C purchases from a retail dealer a supply of this stain and while D, C's wife, is applying it to the floor of the kitchen, C strikes a match to light the gas. An explosion follows, causing harm to D and to E, a friend who is watching D stain the floor. A is subject to liability to D and E.

[22] *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997) (collecting cases).

variant of the apparent-manufacturer doctrine, which applies when "the owner of a trademark or logo licenses a manufacturer to place the licensor's trademark or logo on the manufacturer's product and [to] distribute it as though manufactured by the licensor," and the trademark licensor "participate[s] substantially in the design, manufacture, or distribution of the licensee's products."[23] Section 400 of the Restatement, Second, in contrast, commingles the two variants of the Doctrine. Section 14 embraces a pragmatic compromise reflected in the case law: the defendant need not be a seller of the harm-causing product, thus eliminating the requirement of a formal sales transaction between the defendant seller and its immediate purchaser, as long as the defendant formally licenses its trademark or logo to a manufacturer/licensee and ultimate purchasers of the product detrimentally rely on a belief that the trademark licensor is the manufacturer. As a necessary counter-balance, these relaxations of some of the traditional, mainstream prerequisites are available only when the plaintiff proves, in addition to the defendant's status as trademark licensor, that the licensor participated "substantially in the design, manufacture, or distribution of the licensee's product."[24]

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[23] *Restatement, Third, of Torts: Products Liability* § 14, Comment *d* (1998).

[24] *Ibid.*, second paragraph of text.

In any event, the licensor variation does not arise in the present case because, as far as we are aware, there is no evidence that Pfizer licensed Quigley's use of its logo, substantially participated in the product design, or distributed it as though it was the manufacturer.

### D. The Court of Appeals Applied the Doctrine Correctly.

The Court of Appeals decision in this case applied the apparent-manufacturer doctrine appropriately. In their effort to reverse this decision, Plaintiff's arguments reveal some basic misconceptions concerning the apparent-manufacturer doctrine.

#### 1. *Consumer Expectations of Bystanders.*

A core principle of Plaintiff's argument appears to be that Defendant is liable under the apparent-manufacturer doctrine if reasonable consumers generally, including non-purchaser-bystanders, such as the employees in this case, believed that Defendant manufactured the asbestos-containing compounds.[25] Plaintiff argues that an issue of fact is presented here because she presented evidence to the effect that employees believed that Defendant was the manufacturer. This argument reflects a profound misconception. Under Washington jurisprudence, consumer expectations is a test for product defect; a product is defective if it fails to satisfy reasonable

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[25] Plaintiff's Supplemental Brief, pp. 4, 11-12.

consumer expectations.[26] But the issue in this appeal is not whether a defect existed. It is whether Plaintiff has introduced sufficient proof that this Defendant misled the buyer of the compounds by representing itself as their manufacturer, not what bystanders, ultimate users, or consumers might have expected. The Court of Appeals focused on the appropriate legal standard.

2. *Most Courts Find That Detrimental Reliance is Based on an Objective Standard.*

As previously explained, because the apparent-manufacturer doctrine is a cousin of promissory estoppel, it requires detrimental reliance.[27] Plaintiff's contention to the contrary is based primarily on cases decided under the Consumer Protection Act.[28] The CPA may not require actual reliance, "consistently with legislative intent to ease the burden ordinarily applicable in cases of fraud." [29] However, this legislative judgment regarding consumer fraud claims does not govern a claim brought under a common-law product liability doctrine.

While some early decisions required proof of actual reliance, more recent apparent-manufacturer decisions require reliance to be shown by an

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[26] *Falk v. Keene Corp.*, 113 Wash. 2d 645, 654, 782 P.2d 974, 980 (1989); RCW 7.72.030(3).

[27] *Supra*, pp. 9-10.

[28] See Plaintiff's Supplemental Brief, pp.16-17.

[29] *Panag v. Farmers Ins. Co. of Washington*, 166 Wash. 2d 27, n. 15 at 59, 204 P.3d 885, 900 (2009).

objective standard.[30] In this case, Plaintiff's brief does not cite any evidence that would constitute a prima facie case for objective reliance by the purchaser; instead, they merely offer bystanders' recollections.

3. *The Purchaser's Knowledge that Quigley Was the Manufacturer Does Not Invoke the Sophisticated-User Defense.*

Plaintiff also seeks to distinguish the *Stein* and other cases that the Court of Appeals correctly applied by arguing that they rest on the so-called "sophisticated-user doctrine," which Washington courts have not adopted.[31] However, the sophisticated-user doctrine is irrelevant to the apparent-manufacturer doctrine. The Doctrine reflects the common-sense idea that product distributors are not required to instruct or warn expert, sophisticated purchasers about risks of which such users presumably already know due to their expertise and sophistication.[32] In the present case, Plaintiff's apparent-manufacturer claim fails, not because the decedent's employer was a sophisticated user, but because the employer knew all along that Quigley, not Defendant Pfizer, was the manufacturer.

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[30] See, e.g., *Hebel v. Sherman Equip.*, 92 Ill. 2d 368, 377, 442 N.E.2d 199, 204 (1982), citing (*Burkhardt v. Armour & Co.*, 115 Conn. 249, 264-65, 161 A. 385, 391 (1932); and *Carney v. Sears, Roebuck & Co.*, 309 F.2d 300, 304-05 (4th Cir.1962).

[31] See Defendant's Main Brief, at pp. 30-31.

[32] See James A. Henderson, Jr., *Products Liability: Problems and Process*, 327 (8th ed. 2017).

4. *Use of Pfizer's Logo.*

Plaintiff argues that Quigley's use of Pfizer's logo is sufficient to invoke the Doctrine in the absence of any evidence that the purchaser was confused as to the identity of the manufacturer, arguing that "[t]o reach this conclusion, the court yet again focused its attention on the purchasing relationship and disregarded the uncontroverted evidence of consumer confusion."[33]

Such an assertion overlooks the fact that the purchasing relationship has been at the core of the Doctrine since its inception, and the Court of Appeals was correct in concluding that Quigley was clearly identified to purchasers as the manufacturer of the product, on the packaging and in the communications with purchasers and with OSHA, and when "those materials mentioned Pfizer, it was either as a parent company or in a small logo in the corner."[34]

5. *The Third Restatement.*

Plaintiff's brief takes the Court of Appeals to task because it "imposed the novel limitation articulated in Comment *d* to Restatement (Third) of Torts § 14 that requires the apparent manufacturer to sell or

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[33] Plaintiff's Supplemental Brief, pp. 2-6, 9-11.

[34] *Rublee v. Carrier Corp.*, 199 Wash. App. 364, 381–82, 398 P.3d 1247, 1257, *review granted,* 189 Wash. 2d 1023, 406 P.3d 284 (2017).

distribute the product at issue."[35] But, as explained above,[36] the apparent-manufacturer doctrine has included this requirement from its inception, and the great weight of the case law has followed it. The Third Restatement is not novel in this respect and merely clarified some of the language of its predecessor. Section 400 of Restatement (Second) used the terminology, "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer," and defines the term "puts out a chattel" as anyone who supplies it to others for their own use or for the use of third persons, either by sale or lease or by gift or loan."[37]

Nor is the requirement unfair. Cases addressing this Doctrine constitute a tiny fraction of products liability litigation because, in the vast majority of cases—including asbestos lawsuits—plaintiffs have remedies against companies in the chain of distribution. The rule Plaintiff proposes would extend such liability to other companies outside the chain of distribution, even though they never derived any compensation for the sale of the product, never misled the purchaser, and never derived a contractual benefit from licensing the use of their name on the product.

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[35] Plaintiff's Supplemental Brief, p. 11.

[36] See pp 6-7, supra.

[37] Sec. 400, cmt. *a*.

## V. CONCLUSION

The Court of Appeals decision in this case is consistent with the methodologies of both the Second and Third Restatements and should therefore be affirmed.

DATED: March 30, 2018.

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**PUBLICATIONS:**

**Books and Chapters in Books**

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## Legislative Testimony

Testified many times before committees of the United States Congress and state legislatures on matters relating to tort law and products liability law.

## Speeches and Conferences

I have spoken many times at professional and academic conferences in this country, Europe, and Japan

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